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No 90-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM M. KUNTSLER,

Petitioner,

v.

JOE FREEMAN BRITT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF CERTAIN ATTORNEYS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The six attorneys whose names appear at the conclusion of this motion have all been practicing law for at least fifteen years in the federal and state courts, not only where their offices are located, but throughout the country. They are filing this brief because they are concerned that the decision of the United States Court of Appeals for the Fourth Circuit applying Rule 11 of the Federal Rules of Civil Procedure in this case threatens the ability of attorneys to zealously represent the interests of their clients, not only in the federal courts, but also in state courts which are increasingly adopting their own Rule 11's and following federal court interpretations of it.

Counsel for the *amici* have sought the consent of counsel for the respondents, Senior Deputy Attorney General James

J. Coman, who declined to consent but stated that he did not intend to oppose the filing of the accompanying brief. Undersigned counsel has read the proposed brief *amicus curiae* that has been filed on behalf of Benjamin Civiletti *et al.* and believes that the accompanying brief makes several important additional points not made in the Civiletti brief or in the petition. Accordingly, we urge that the Court grant this motion and accept the accompanying brief in support of the petition.

Respectfully submitted,

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December 21, 1990

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTERESTS OF THE *AMICI* 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 3

CONCLUSION 9

TABLE OF AUTHORITIES

CASES: Page

Cooter & Gell v. Hartmarx Corp.,
110 S.Ct. 2447 (1990) 7

Harris v. United States,
382 U.S. 162 (1965) 7

Hensley v. Eckerhart,
461 U.S. 424 (1983) 6

Maisonville v. F2 America Inc., 901 F.2d 746
(9th Cir. 1990), *petition for certiorari*
pending sub nom. Dombroski v. F2 America, Inc.,
No. 90-617 8

Norman v. Housing Authority, 836 F.2d 1292
(11th Cir. 1988) 6

STATUTE AND RULES:

42 U.S.C. § 1988 ..... 4, 6

F.R.C.P. 11 ..... *passim*

F.R.C.P. 41 4

F.R.C.P. 41(a) 3, 5

F.R.C.P. 41(a)(1)(ii) 2

F.R.C.P. 41(a)(2) 2, 5

F.R.C.P. 56 6

F.R.Cr.P. 42 7

F.R.Cr.P. 42(b) 7

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INTERESTS OF THE *AMICI*

The interests of the attorneys who are seeking leave to file this brief are set forth in the accompanying motion for leave to file.

STATEMENT OF THE CASE

Instead of answering the amended complaint filed in this case, the defendants filed what they styled a motion to dismiss, even though it was accompanied by supporting affidavits. For reasons that are not relevant to this petition, plaintiffs and their attorneys, including petitioner Kuntsler, decided to dismiss the complaint with prejudice. Counsel for the defendants stated

that it would be easier if plaintiffs moved for dismissal under Rule 41(a)(2), rather than having defendants' counsel sign a stipulation of dismissal under Rule 41(a)(1)(ii), but that plaintiffs could represent in their motion that defendants did not oppose the motion. At no time did defendants ask that any terms or conditions be included in the order of dismissal, and the court granted the motion to dismiss with prejudice in the form submitted by plaintiffs. Forty-five days later, with no prior warning or even any mention of the subject, defendants moved for sanctions in the form of attorneys' fees against plaintiffs and their attorneys under Rule 11 of the Federal Rules of Civil Procedure. They alleged that the case had been filed for an improper purpose and that no adequate factual or legal investigation had been conducted, relying on the affidavits that they had submitted in support of their prior motion to dismiss.

Plaintiffs opposed the motion through the submission of counter-affidavits and also sought discovery, since there had been none in the case, and an evidentiary hearing. The district court rejected both requests, heard oral argument, and then asked defendants to submit a statement of their attorneys' fees to the court. Two days after receiving that submission, and before plaintiffs had an opportunity to reply, the court entered its order, finding that the case had been filed for an improper purpose, awarding defendants the full amount of their fees, totalling more than $92,000, and imposing a sanction payable to the court of $10,000 against each of plaintiffs' three attorneys.

On appeal, plaintiffs raised a number of arguments, most of which the court of appeals rejected, although it did vacate the sanctions payable to the court and ordered further proceedings regarding the amount of fees payable to the defendants. At the heart of the court's affirmance are two rulings that form the basis for this petition: (1) that the district court

properly entertained defendants' Rule 11 application, even though the case had been dismissed with prejudice and without any reservation by the defendants of a right to seek sanctions or attorneys' fees; and (2) that the district court did not err in refusing to permit discovery or hold an evidentiary hearing and properly made a factual finding that the case had been filed for an improper purpose solely on the basis of sharply conflicting affidavits.

REASONS FOR GRANTING THE WRIT

The Court should grant review in this case because the rulings below so far depart from fundamental principles of fairness under the Federal Rules and elementary principles of due process that this Court's intervention is required. This petition is *not* about whether petitioner and his two co-counsel were properly sanctioned under Rule 11; indeed *amici* take no position on that question. This petition asks the Court to rule on far more basic questions: whether the district court should ever have entertained the sanctions motion because the case had been concluded with no hint that defendants would seek sanctions under Rule 11, including more than $92,000 in legal fees, and whether the district court impermissibly decided contested issues of fact solely on the basis of conflicting affidavits, without affording plaintiffs the opportunity to cross-examine the witnesses relied on by defendants.

1. The petition fully sets forth the precise legal errors made below, but they can be summed up in a single phrase that covers both questions presented: the absence of fairness and fundamental due process. Quite apart from the technical requirements of Rule 41(a), it is simply unfair to allow a party to consent to the dismissal of a lawsuit, with prejudice, and with no reservations of any kind, and then to be permitted to return to court 45 days later, and seek nearly $100,000

in legal fees from its adversary. While it was defendants here who sought fees under Rule 11, it could equally be the plaintiffs in another case who would rely on that Rule, or even 42 U.S.C. § 1988, in making a comparable request. Accordingly, when a motion to dismiss is made under Rule 41, or a settlement is entered into between the parties, everyone is entitled to know all of the terms of the deal, including whether there are any hidden requests that may surface later. Unless a dismissal with prejudice means that the case is truly over, counsel will have to think of all the possible requests that their adversary may make and specifically negate each of them. There is no reason to impose such a burden on counsel or to erect such barriers to the peaceful resolution of litigation. If a party has reservations or wishes to preserve its options to seek any form of ancillary relief, the burden should be on that party to assure that any order of dismissal is conditioned on the right to seek that relief, and failure to include such conditions should preclude the court from even entertaining that request.

It is important to note that disputes about Rule 11 do not always or even primarily involve money. In this case the district court ruled that petitioner had filed a lawsuit for an improper purpose, a charge that, in itself, is devastating to the reputation of any attorney, and one that cannot be allowed to go unopposed, even if defendants had sought only $1 in sanctions. *Amici* can attest from their own experiences that disputes about attorneys' fees always engender significant passions on both sides, a problem that increases exponentially when the reputation of an attorney is added to the matter, as is invariably true under Rule 11. The problems are only intensified where, as here, the district court awarded fees and found an improper purpose on petitioner's part, which meant that petitioner (as well as his co-counsel) had to hire counsel to represent him on appeal and now to seek review in this Court.

Moreover, while the sanctioned persons are attorneys here, the target of a Rule 11 motion will often include clients who thought that the case was over. Indeed, their presence as targets of a Rule 11 motion may well necessitate the retention of additional counsel to represent them, since their interests and defenses may differ from those of their original counsel. Of course, all of this would have been avoided had the district court done the only fair thing under these circumstances and refused to consider defendants' untimely Rule 11 motion. Because it failed to do so, and because the court of appeals failed to correct that error, this Court should grant review so that everyone will know that, if a party wants to seek sanctions under Rule 11, and the other side either seeks to settle the case or dismiss it by consent or motion under Rule 41(a), that party must tell its adversary beforehand and not wait until after the court has entered an order of dismissal.

2. Review should also be granted because of the fundamentally unfair way that the district court decided the sharply contested factual issue of the purpose for which petitioner and his co-counsel filed this case. As explained in the petition, the district court had no personal familiarity with the case prior to the filing of the Rule 11 motion, other than the ministerial act of approving the uncontested motion to dismiss under Rule 41(a)(2). The only "evidence" on the issue of improper purpose were affidavits from opposing sides, each with its very different view of the facts. There had been no discovery, and no opportunity to test the truth of either set of affidavits through cross-examination, either on deposition or in open court. Despite all of this, the district court simply proceeded to resolve the disputed factual issue on the papers alone, in this case in favor of defendants, although it would have been equally improper for him to have decided the issue in favor of plaintiffs if defendants had made comparable requests.

Whatever the proper procedure for resolving factual disputes in Rule 11 situations may be, they are a far cry from what the district court did here. This can be seen by comparing how little process was afforded here in contrast with what would have happened had defendants sought similar relief other than under Rule 11. Suppose that they had sought the same $92,000 in attorneys' fees under 42 U.S.C. § 1988 or the bad faith exception to the American rule. While this Court has made it clear that a fee dispute should not become "a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424,437 (1983), it is inconceivable that a dispute of this magnitude would be resolved by so summary a process. *See Norman v. Housing Authority*, 836 F.2d 1292, 1304 (11th Cir. 1988)(requiring oral hearing "where there is a dispute of material historical fact" in fee disputes). Or consider what would have happened if defendants had filed a state law counterclaim for abuse of process or some similar claim of tortious conduct under North Carolina law, which is, in essence, what they alleged here under Rule 11. Surely, in that case, let alone in one brought as an independent action, no one would consider resolving a dispute of this kind without discovery and in all probability a trial, or at least strict compliance with Rule 56, or its state law equivalent. Yet here, the district court simply threw aside any semblance of fairness and due process and awarded nearly $100,000 to defendants.

There is another closely analogous proceeding to what occurred here that helps crystalize the error of the district court. The only portion of the ruling below against petitioner that the court of appeals set aside was the $10,000 monetary sanction imposed against him and his two co-counsel and made payable to the district court. That portion of the district court's Rule 11 order is very similar to an order of criminal contempt, with its judgment of improper conduct against a member of the bar and its payment of money to the court, rather than

to a private party or its counsel. But Rule 42 of the Federal Rules of Criminal Procedure, as well as this Court's recognition that due process applies to criminal contempt proceedings, *Harris v. United States*, 382 U.S. 162 (1965), provides assurances that any person accused of criminal contempt has adequate notice and an opportunity to be heard, not the "trial by affidavits" approved by the court of appeals here. To be sure, a person facing criminal contempt may be sent to jail, but for members of the bar, their reputations may be more important to them than a day or two in detention. Regardless of the differences between the proceedings, the nature of the sanction that the district court imposed here is sufficiently close to criminal contempt, yet the procedures employed by it so far from those under Rule 42(b), as to suggest that the courts below have violated concepts of fundamental fairness in summarily adjudicating vital rights in a Rule 11 motion without affording petitioner a meaningful opportunity to present his defense.

There is another reason why the procedures followed by district courts in deciding Rule 11 motions are so important. Last term in *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2457-61 (1990), this Court held that the standard of review for the courts of appeals in Rule 11 cases was whether the decision was an abuse of discretion. As a result, every Rule 11 decision of a district court takes on special importance because it is effectively insulated from searching judicial review. Therefore, the procedural protections of discovery and an opportunity for a hearing may be the only safeguards against arbitrary imposition of penalties against those who bring unpopular cases, as this case surely was.

Indeed, the situation is even worse in some circuits where magistrates have been allowed to decide Rule 11 motions and impose sanctions, subject only to the district court's review

under the "clearly erroneous" standard. *Maisonville v. F2 America Inc.*, 901 F.2d 746 (9th Cir. 1990), *petition for certiorari pending sub nom. Dombroski v. F2 America, Inc.*, No. 90-617. But if, as the court of appeals permitted here, even the basic requirements of due process need not be observed, there is no protection for the attorney who does anything that might bring displeasure to the judge before whom he or she is appearing. This Court should grant review to assure that the procedural protections afforded under Rule 11 are not the diluted ones used here, but include a meaningful opportunity to contest the essential factual issues on which Rule 11 motions are decided when the basis for imposing sanctions is that the attorney filed a case for an improper purpose, as the district court concluded here.

* * * *

This petition was filed by a member of the bar, and this *amicus* brief is submitted on behalf of six attorneys. In many if not most cases under Rule 11, the sanctions award is directed against an attorney, although some clients pay such awards for their counsel. But regardless of who pays in the short run, in the long run it is clients who will suffer, and those who will suffer the most are the neediest in our society who turn to the courts because they have no other hope of redress. If lawyers are in constant fear of damaging both their reputations and their bank accounts because of Rule 11, and if they believe that they will not even be afforded fair procedures for having Rule 11 claims against them adjudicated —as they surely will if this decision is allowed to stand — then they will simply not take on these cases, and the clients who so desperately need their help will be left outside the courthouse doors. Cases like this, which are invariably taken on a contingent fee basis, are hard enough to win that they discourage most lawyers from taking them, without the sword of Rule 11 and the lack of due process and fundamental fairness hanging over their heads.

With the added burden imposed by the rulings below, the message will be clear when cases like this come through the door: just say no.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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